LIBRARY
SUPREME COURT U.S.

Supreme Court, U. S.
FILED
DEC 5 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

NO. 73-843

LYKES BROS. STEAMSHIP CO., INC., *Petitioner*

v.

M. F. BROWN, *Respondent*

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI

GUS A. SCHILL, JR.
KENNETH D. KUYKENDALL
Attorneys for Petitioner

Of Counsel:

ROYSTON, RAYZOR, COOK & VICKERY
Suite 3710
One Shell Plaza
Houston, Texas 77002
713/224-8380

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

IN THE

Supreme Court of the United States

NO. 73-843

LYKES BROS. STEAMSHIP CO., INC., *Petitioner*

v.

M. F. BROWN, *Respondent*

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI

Petitioner prays that the Court reconsider the denial of its Petition for Writ of Certiorari entered by the Supreme Court on January 21, 1974. In accordance with Rule 58(2) of the Supreme Court, the Petitioner will confine this Petition to intervening "circumstances of substantial or controlling effect" in requesting this Court to grant its Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

A RECENT DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FURTHER REVEALS THE DIRECT CONFLICT IN THE CIRCUITS AND THE UNJUSTIFIED EXTENSION OF THE LIABILITY PER SE PRINCIPLE IMPOSED ON VESSEL OWNERS FOR THE BREACH OF A SAFETY REGULATION

The Petitioner set forth in its Petition for Writ of Certiorari numerous cases revealing the conflict between the Second Circuit,[1] Fourth Circuit[2] and Fifth Circuit[3] with regard to the effect of a breach of the Safety & Health Regulations for Longshoring in determining the vessel owner's liability to injured longshoremen (Petition for Writ of Certiorari, pp. 5-11). Nevertheless, since filing the Petition for Writ of Certiorari, the Court of Appeals for the Fifth Circuit has decided yet another case which constitutes a substantial and unjustified extension of the liability per se principle in connection with the breach of a safety regulation, and this recent decision focuses attention upon the importance of the issue presented by the Petition for Writ of Certiorari in the

---

1. In *Albanese v. N.V. Nederl. Amerik Stoomv. Maats., et al,* 346 F.2d 481 (2d Cir. 1965) reversed on other grounds, 382 U.S. 283, 15 L.Ed.2d 327, 86 S.Ct. 429, reh. den. 382 U.S. 1000, 1030, 15 L.Ed.2d 490, 544, 86 S.Ct. 534, 644 (1965), the Second Circuit held that the breach of the safety regulation was not relevant in determining the liability of the vessel owner for the longshoreman's injury.

2. In *Provenza v. American Export Lines, Inc.*, 324 F.2d 660, 666 (4th Cir. 1963), the Fourth Circuit held that the breach of the safety regulation was only "relevant" evidence in determining whether or not the vessel was liable for the longshoreman's injury.

3. In *Manning v. MV SEA ROAD*, 417 F.2d 603 (5th Cir. 1969) the Fifth Circuit held that a breach of the safety regulation rendered the vessel unseaworthy and liable as a matter of law for the longshoreman's injury.

present case and the conflict between the Circuits. The recent case of *Arthur v. Flota Mercante Gran Centro Americano, S. A.*, ____ F.2d____ (5th Cir., November 27, 1973) reh. den. ____ F.2d____ (5th Cir., December, 1973) demonstrates that the Fifth Circuit imposes liability per se on a vessel owner for breach of a safety regulation irrespective of whether the breach is called unseaworthiness or negligence and irrespective of the duty owed by the vessel owner to the injured party. In this case, the Court of Appeals for the Fifth Circuit simply affirms the proposition that liability should be imposed on the vessel owner as a matter of law when the regulation has been violated. A copy of the slip opinion of the case is attached as Appendix "A" to this Petition.

In *Arthur v. Flota Mercante Gran Centro Americano, S.A., supra,* the National Cargo Bureau employee was not owed the warranty of seaworthiness by the vessel owner, and the case was submitted to the jury on the question of negligence- The District Court instructed the jury that a breach of the safety regulation would be considered negligence per se, and the jury imposed liability against the vessel owner for the violation of such safety regulation. The Court of Appeals for the Fifth Circuit affirmed this legal principle and held that a violation of the safety regulation constituted negligence per se. The Court of Appeals for the Fifth Circuit affirmed the Judgment of the District Court even though the safety regulation specifically provided that such regulation did not increase or diminish the responsibility of the vessel owner.[4] Moreover, the Safety & Health Regu-

4. 29 C.F.R. §1504.2(b) provides as follows:
"It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents

lations for Longshoring specifically apply to the employer (stevedore) and the employee (longshoremen), and such regulations do not apply so as to create duties of the vessel owner owed to employees of other independent contractors such as the National Cargo Bureau.[5]

Arthur v. Flota Mercante Gran Centro Americano, S.A., supra, more clearly focuses upon the conflict between the Second Circuit and the Fifth Circuit than any case cited in the Petition for Writ of Certiorari. In both the Fifth Circuit decision of *Arthur* and the Second Circuit decision of *Albanese v. N.V. Nederl. Amerik Stoomv. Maats., et al, supra,* the cases were tried to a jury. In both cases, the District Court instructed the jury that the safety regulations were binding on the vessel owner. However, in *Albanese* the Second Circuit stated that such instruction was "erroneous" because the safety regulation clearly stated that such regulation was not in-

---

or Masters of vessels unless such persons are acting employers, nor is it the intent of these regulations to relieve such owners, operators, agents or Masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom."

5. 29 C.F.R. §1504.3 defines the employers and employees governed by these regulations as follows:

"(c) The term 'employer' means an employer any of whose employees are employed, in whole or in part, in longshoring operations or related employments, as defined herein within the Federal maritime jurisdiction on the navigable waters of the United States.

(d) The term 'employee' means any longshoreman, or other person engaged in longshoring operations or related employments, within the Federal maritimes jurisdictions on the navigable waters of the United States, other than the master, ship's officers, crew of the vessel, or any person engaged by the master to load or unload any vessel under 18 net tons.

(j) The term 'related employments' means any employments performed as an incident to or in conjunction with longshoring operations including, but not restricted to, securing cargo, rigging, and employment as a porter, checker, or watchman."

tended to place any additional duty on the vessel owner. 346 F.2d 484. On the other hand, in *Arthur,* the Fifth Circuit affirmed the jury instruction of the District Court that the breach of the safety regulation rendered the vessel owner liable.

In conclusion, there can be no clearer example of the conflict between the Circuits than shown by a reading of these two cases. There is a definite and irreconcilable conflict between the Second Circuit and Fifth Circuit, and this Court should grant the Petition for Writ of Certiorari in order to resolve this conflict between Circuits. Moreover, the unjustified further extension of the liability per se principle by the Fifth Circuit for the breach of a safety regulation is an unwarranted abridgment of the principles of admiralty and maritime law of the United States as formulated by this Court.

Respectfully submitted,

Gus A. Schill, Jr.

Kenneth D. Kuykendall
Attorneys for Petitioner

CERTIFICATE OF COUNSEL

I certify that this Petition for Rehearing of Denial of Petition for Writ of Certiorari is presented in good faith and not for delay, and the Petition is restricted to the conflict between the Circuits further demonstrated and clearly illustrated by the above discussed recent decision

from the Court of Appeals for the Fifth Circuit, which is in direct conflict with the decisions from the Second Circuit concerning the relevance and effect of a breach of the Safety and Health Regulations for Longshoring. This certificate is made by the undersigned attorney because the counsel of record, Gus A. Schill, Jr., is presently out of the country and not expected back in the United States until after the date for filing such Petition for Rehearing as specified by Rule 58(2) of the Rules of the Supreme Court.

Kenneth D. Kuykendall

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Petition for Rehearing of Denial of Petition For Writ of Certiorari has been served upon the attorney for Respondent, Mr. Atreus Clay, 5643 Turtle Creek Road, Houston, Texas 77017, by depositing the same in the United States mail, certified mail, return receipt requested, on this 14 day of February, 1974.

Of Royston, Rayzor, Cook & Vickery

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-2597

GODFREY ARTHUR,
Plaintiff-Appellee,

versus

FLOTA MERCANTE GRAN CENTRO AMERICANA S. A.,
Defendant-Third Party,
Plaintiff-Appellant,

NATIONAL CARGO BUREAU, INC.,
Third Party Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

(November 27, 1973)

Before BELL, INGRAHAM and RONEY, Circuit Judges.

INGRAHAM, Circuit Judge: This controversy arises out of an accident that occurred when plaintiff Godfrey Arthur, an employee of National Cargo Bureau, Inc., boarded the M/V QUETZALTENANGO, a vessel owned by the defendant Flota Mercante Gran Central Americana S.A., in order to inspect the vessel for

grain loading. While the ship was docked at New Orleans, the Mississippi River reached a particularly low level and consequently the traditional gangway could not be used for boarding. Instead a brow gangway was placed on the wharf in such a manner that one end extended over the vessel's after bulwark railing. From this brow gangway a short bulwark ladder consisting of four or five steps was connected to the bulwark with the base of the ladder resting on the ship's deck. Because the bulwark ladder was too short, the ladder's steps were not parallel with the ship's deck, but slanted downward towards the deck and away from the bulwark. Although the brow gangway was equipped with hand rails, the bulwark ladder was not so equipped. Also, where the brow gangway intersected with the bulwark ladder, there was an overhang, called a fishplate, extending from the vessel over the bulwark railing that created a limited opening through which the ship was boarded. As this opening was approximately four feet in height, it was necessary to stoop or lean to go through this opening and then step down on the bulwark ladder.

On June 20, 1969, plaintiff Arthur boarded the vessel to inspect the holds for grain loading. When plaintiff crossed the brow gangway, he stepped down on the bulwark ladder, one foot slipped and he fell striking his coccyx on a ladder step.

Arthur subsequently filed suit against defendant Flota Mercante alleging both negligence and unseaworthiness, and Flota Mercainte filed a third party claim against Arthur's employer, National Cargo Bureau, for indemnity. At trial the court dismissed the unseaworthiness claim because plaintiff was not performing services

normally done by a seaman;[1] Flota Mercante's third party claim for indemnity was also dismissed. The case was tried on the negligence issue, and the jury returned a verdict in favor of plaintiff for $25,000. In answer to special interrogatories, the jury found plaintiff ten percent contributorily negligent. The award was reduced accordingly, and judgment was entered for plaintiff in the amount of $22,500. Flota Mercante appeals, urging that it fulfilled its duty of care owed to the plaintiff, that the trial court improperly instructed the jury that a violation of the Safety and Health Regulations was negligence per se, that the court improperly dismissed its third party claim for indemnity, and that the damages were excessive. We find no merit in these contentions and therefore AFFIRM.

The first question is whether the defendant fulfilled its duty of care owed to the plaintiff. While it is well established that a shipowner owes a duty to provide invitees boarding or leaving the vessel with a reasonably safe means of access, *Tullis v. Fidelity & Casualty Co.*, 397 F.2d 22, 24 (5th Cir., 1968), defendant contends that it satisfied this duty. Because negligence is measured against the surrounding circumstances, Flota Mercante urges that the particularly low level of the Mississippi River justified its using this means of access. Indeed, Flota urges that under these circumstances this was the only method of access available.

A review of the record indicates ample evidence to support the jury's finding that the defendant breached

1. Because of the way in which we dispose of this case, it is unnecessary for us to decide whether the plaintiff, an employee of National Cargo Bureau who inspects and certifies vessels for loading grain, is a "seaman."

its duty of care and was therefore negligent. Testimony introduced at trial demonstrated that the method of access provided could have been modified so as to furnish a safer means of ingress or egress. Or an entirely different type of access, such as extending a shore gangway from the dock to the ship's weather deck, could have been substituted. In short, the evidence supports the jury's conclusion that the combination of the brow gangway and the bulwark ladder was not the only means of access that could have been furnished under these circumstances, and that the defendant breached its duty of care.

Also in regard to duty of care, defendant argues that it owed no duty to protect the plaintiff from the risk of harm created by the dangerous condition of the vessel because plaintiff, as an experienced seaman, knew or should have known of the dangerous condition. The trial court properly considered this contention as relating to plaintiff's negligence in boarding the vessel in the condition in which it existed. Comparative negligence is the rule to be followed; the negligence of the plaintiff, regardless of how gross, does not preclude recovery, but only mitigates damages. *Movible Offshore Co. v. Ousley,* 346 F.2d 870, 873 (5th Cir., 1965). The jury found Arthur ten percent negligent, and the court reduced the plaintiff's award of damages accordingly.

The next issue is whether the court erred in instructing the jury that a violation of the Safety and Health Regulations is negligence per se. The regulations provide:

> "When the upper end of the means of access rests on or is flush with the top of the bulwark, substantial steps, properly secured and equipped

> with at least one substantial hand rail approximately 33 inches in height shall be provided between the top of the bulwark and the deck."

29 C.F.R. § 1504.21(f). In accordance with this regulation, the trial court instructed the jury that, when such a ladder arrangement is employed, the steps must be secured and equipped with one substantial handrail. If this statutory duty is not fulfilled, the shipowner is negligent as a matter of law. Defendant contends that this instruction confused the jury in that it conflicted with another charge delineating contributory negligence. More importantly, defendant contends that this regulation applies only where the plaintiff's claim is for unseaworthiness because the instruction imposes too high a standard of care where the only basis of recovery is negligence. We do not agree.

This court was first confronted with the application of safety regulations as a standard for determining negligence in *Marshall v. Isthmian Lines, Inc.*, 334 F.2d 131 (5th Cir., 1964). In *Marshall* there was a violation of the Coast Guard Regulations relating to the shipment of hazardous articles. Judge Brown, speaking for the court, stated:

> "The law is well established that violation of a statute which is intended to protect the class of persons to which a plaintiff belongs against the risk of the type of harm which has in fact occurred is negligence in itself. Inherent in this statement of the legal principle are three questions which must be resolved before liability could be imposed in this case on a negligence *per se* theory. What proof makes out a violation of the regulations? Were the regulations designed to protect longshoremen? Were they

> intended to protect against the risk of the kind of harm that occurred here . . ."

Id. at 134 (citations omitted); *see Phipps v. S.S. Santa Maria,* 418 F.2d 615 (5th Cir., 1971); *Manning v. M/V Sea Road,* 417 F.2d 603 (5th Cir., 1969); *Grigsby v. Coastal Marine Serv. Inc.,* 412 F.2d 1011 (5th Cir., 1969); *Venable v. A/S Det Forenede Dampskibsselskab,* 399 F.2d 347 (4th Cir., 1968); *Provenza v. American Export Lines, Inc.,* 324 F.2d 660 (4th Cir., 1963); *Simmons v. Gulf and South American S.S. Co.,* 260 F.Supp. 525 (E.D. La., 1966), *aff'd,* 394 F.2d 504 (5th Cir., 1968); Bue, Admiralty Law in the Fifth Circuit — A Compendium for Practitioners I, 4 Houston L.Rev. 347, 404 (1966). The litigants cite us to no case, and our independent research reveals none, in which the regulations were applied when the sole basis for recovery was negligence. Moreover, in the cases dealing with both unseaworthiness and negligence, the courts have failed to say that the regulations apply to one theory of recovery, but not the other. *E.g. Manning v. M/V Sea Road, supra,* at 611-12; *Provenza v. American Export Lines, Inc., supra,* at 665. Significantly, the purpose of these regulations are to promote safety in the industry and establish an unambiguous standard for measuring industrial safety as it relates to longshoremen, harbor workers or other business invitees that come into contact with a vessel. That purpose is advanced when the court instructs the jury as it did in this case. We hold that if the *Marshall* criteria are met, the court may instruct the jury that a violation of the Safety and Health Regulations is negligence per se.

We turn then to these requirements. First, there was clearly sufficient proof to establish a violation of the regulations. The regulations specifically require that, when a means of ingress or egress is of the type involved in this case, the steps must be secured and equipped with one substantial handrail. It is undisputed that the bulwark ladder did not have a handrail of any type and that the steps were not secured so that they would be parallel with the ship's deck.

Second, it is clear that the regulations were designed to protect plaintiff, a surveyor employed by National Cargo Bureau. The inspection and certification of vessels by a National Cargo Bureau surveyor is a prerequisite to the loading of grain, and the vessel must be recertified when it is ready to sail. This activity is classified by the Department of Labor as employment related to longshoring, ship repairing and ship building, and therefore falls within the scope of the regulations. 33 U.S.C.A. § 902(3).

Third, the regulations were designed to protect against the type of risk created in this case. Undoubtedly, the regulations requirements that the steps be properly secured and that the gangway be furnished with a handrail were intended to provide safe access for persons boarding or leaving the vessel, and to prevent accidents like the one involved in this lawsuit. Therefore, because the three criteria necessary to establish negligence as a matter of law have been met, we hold that the trial court did not err in instructing the jury that if they find the regulation was violated, then such a violation is regarded in law as negligence per se. The court went on to instruct the jury that before they

may find for the plaintiff, such violation of the regulation must be shown by a preponderance of the evidence to have been the proximate cause of the plaintiff's injury.

The third issue is whether the trial court erred in dismissing Flota Mercante's claim against National Cargo Bureau for indemnity. Flota first relies on *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), and contends that the indemnity rule enunciated there is applicable in this case. Alternately, Flota Mercante urges that, even if the *Ryan* doctrine does not apply, National Cargo was contractually obligated to supply the defendant with competent personnel to inspect the vessel. Flota reasons that National Cargo warranted that its employee would inspect the vessel in a workmanlike manner, that the warranty was breached when plaintiff negligently contributed to his own injury, and that indemnity therefore follows.

It is unnecessary to decide whether the *Ryan* doctrine applies because the facts of this case simply do not support Flota Mercante's claim for indemnity. The responsibility for providing safe access was solely that of the shipowner, not the responsibility of the employees of National Cargo. There is no evidence showing that National Cargo's employees contributed in any way to the creation of the dangerous condition. The shipowner did not fulfill its duty to furnish safe acccess, and it is responsible for its own negligence. Flota's claim that it is entitled to indemnity from National Cargo for its own negligence is meritless.

Finally, Flota Mercante contends that the award of damages was excessive, and therefore the trial court abused its discretion in not granting a new trial or

ordering a remittitur. The jury heard testimony from three doctors who described the plaintiff's injury as coccydynia, a painful condition of the coccyx. Additionally, there was testimony telling of the painful inconveniences that must be endured by the plaintiff in the future and that had been endured by him for the past three years. We believe the jury's award of damages is supported by the evidence.

The judgment of the district court is *Affirmed.*